Supreme Court, U.S.
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Case No._____

IN THE

Supreme Court Of The United States

Tom Glenn Henry

Petitioner,

vs.

United States of America

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Federal criminal defendant in an action under 28 U.S.C. § 2255 has made a substantial showing of the denial of a constitutional right so as to entitle him to a certificate of appealability under 28 U.S.C. § 2253(c)(2) where he has shown that his defense counsel failed to object to the action of a district court judge in himself deciding the guilt of a criminal defendant as to two of the four elements of a Federal criminal charge rather than submitting those elements to the jury for determination of guilt or innocence?

2. Whether under the facts of this case this Court must grant certiorari and issue a 28 U.S.C. § 2253(c)(1) certificate of appealability?

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OPINIONS BELOW

The Report and Recommendation of the magistrate judge for the United States District Court for the Middle District of Tennessee filed on July 30, 1999, recommending denial of Petitioner's claims under 28 U.S.C. § 2255 is Appendix A. The September 29, 1999, Memorandum Order of the United States District Judge adopting and expanding the Report and Recommendation and overruling Petitioner's objections is Appendix B. The order of the United States District Court for the Middle District of Tennessee denying Petitioner's motion for a certificate of appealability under 28 U.S.C. § 2253 is Appendix C. The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's motion for a certificate of appealability under 28 U.S.C. § 2253 is Appendix D.

JURISDICTION

This Court has jurisdiction pursuant to *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 1972, 141 L.Ed.2d 242 (1998)

STATUTES INVOLVED

The statutes involved are 18 U.S.C. § § 1001 and 287 and 28 U.S.C. § § 2253 and 2255, which are reproduced in Appendix E.

STATEMENT OF THE CASE

On May 8, 1996, Tom Glenn Henry ("Petitioner"), filed a motion pursuant to 28 U.S.C. § 2255 seeking to vacate, set aside, or correct his Federal criminal conviction.[1] Petitioner was indicted on May 7, 1991. A superseding indictment of 36 counts was issued on February 20, 1992, against Petitioner and two co-defendants. Petitioner was not charged in Count 30. The charges against Petitioner were: (1) Counts 1-3, conspiracy to defraud Medicare, 18 U.S.C. § 371; (2) Counts 4-5, theft from a program receiving Federal funds, 18 U.S.C. § 666(a)(1)(A); (3) Counts 6-13, money laundering and aiding

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1 The direct appeal of that conviction resulted in an unpublished affirmance by the United States Sixth Circuit Court of Appeals. *United States v. Henry*, 12 F.3d 215 (Table) (6th Cir. 1993)

and abetting money laundering, 18 U.S.C. §§ 1957 and 2; (4) Counts 14-29, false statements to Medicare and aiding and abetting false statements to Medicare, 18 U.S.C. §§ 1001 and 2; (5) Count 31, paying kickbacks, and aiding and abetting payments, in exchange for patient referrals, 42 U.S.C. § 1320(a)-7(b)(2)(a) and 18 U.S.C. § 2; (6) Counts 32-34, obstructing a Federal auditor and aiding and abetting such obstruction, 18 U.S.C. §§ 1516 and 2; (7) Count 35, making false claims and aiding and abetting, 18 U.S.C. §§ 287 and2; (8) Count 36, forfeiture of a house and land and $191,206.80 in currency, 18 U.S.C. §§ 982(b)(1)(A), 1957, and 2.[2]

The undisputed evidence at the trial established that all alleged claims and false statements were submitted to a private insurance company. The Government contended that the insurance company had contracted with the United States Department of Health and Human Services in such a manner as to make submission of the claims and statements to the private insurance company a violation of 18 U.S.C. § § 287 and 1001.

The instructions to the jury as to the 18 U.S.C. §1001 charges (Counts 14 through 29) were as follows:

"In order to sustain its burden of proof for the crime if (sic) knowing and willfully making a false statement to the United States Government as charged in Counts Fourteen through Twenty-Nine of the indictment, the government must prove the following four essential elements with regard to each count, and as to each defendant charged, beyond a reasonable doubt; First, that the defendant knowingly made or used a false or fictitious writing or document detailed in the indictment. Second, that in making or using the false or fictitious writing or document, the defendant acted willfully,

2 While it is difficult to determine from this "kitchen sink" indictment what the prosecution's forfeiture theory was, it apparently was that if Petitioner was convicted of Counts 4-13, charging theft from a government program, money laundering, and aiding and abetting, the property and currency listed should be forfeited since it was acquired from those illegal acts. Count 36 alternatively sought forfeiture of substitute assets if the listed ones could not be collected.

knowing the writing or document to contain a false or fictitious statement or entry. Third, that the statement was made in a matter within the jurisdiction of any department or agency of the United States. Fourth, that the statement was material. *The court has already decided that the matters alleged in these counts are within the jurisdiction of the United States, and that the alleged statements are material. Therefore, you are only to decide element one, whether the defendants knowingly made a false, fictitious or fraudulent statement or representation; and element two, whether in making such a statement or representation the defendants acted willfully. The fact that the Court has found the third and fourth elements to be satisfied, should not be considered by you in any way in deciding whether the government has met the burden of proof with regard to the first two elements.*" (emphasis supplied) (Docket Entry No. 2 at 3-4)

The jury instructions as to the 18 U.S.C. § 287 charge (Count 35) were as follows:

'In order to sustain its burden with respect to Count Thirty Five of the indictment, the government must prove the following three elements beyond a reasonable doubt. First, that the defendant presented to a department or agency of the United States a claim upon or against the United States, or any department or agency thereof. Second, that the claim presented was false, fictitious, or fraudulent. Third, that the defendant knew the claim to be false, fictitious, or fraudulent. *The United States Department of Health & Human Services is an 'agency of the United States' within the meaning of this section. Claims presented under Medicaid or Medicare to a private insurance company acting as intermediary are 'presented to a department or agency in the civil service of the United States' if that private insurance company has been contracted by the government to administer the program.*" (emphasis supplied) (Docket Entry No. 2 at 4)

On June 23, 1992, a jury convicted Petitioner of all counts charged against him except Count 14. On Count 36, the jury found that the currency was due to be forfeited, but that the house and land was his wife's separate property and should not be forfeited.[3]

Petitioner admits that none of the issues raised in this 28 U.S.C. § 2255 proceeding were raised on appeal. The conviction and sentence were affirmed in an unpublished order at 12 F.3d 215 (Table) (6th Cir. 1993)

On May 8, 1996, Petitioner filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his conviction and sentence. The only grounds of that motion which are raised in the present certiorari petition are that Petitioner received the ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution because Petitioner's counsel failed to object when the district judge in violation of the Fifth and Sixth Amendments of the United States Constitution decided and, in effect, directed a verdict on two of the four elements the Government is required to prove beyond a reasonable doubt to a jury to establish a violation of 18 U.S.C. § 2001 and on one of the three elements the Government is required to prove beyond a reasonable doubt to a jury to establish a violation of 18 U.S.C. § 287.

On March 24, 1998, the district judge referred the case to a magistrate judge for consideration of the pending amended petition. On July 30, 1999, the magistrate judge issued an order and opinion styled "Report and Recommendation", concluding that the 28 U.S.C. § 2255 petition should be denied. (Appendix A) The magistrate judge was of the opinion that Petitioner's counsel was not ineffective for his failure to object to the judge taking from the jury the elements of the criminal offenses charged because (1) the law in the Sixth Circuit at the time of Petitioner's trial was that materiality was a question of

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3 The Government evaded this verdict by convincing the judge that the money to purchase the house and land came from Petitioner's alleged wrongful activities. The house and land was seized and sold by the Government.

law to be decided by the court, not the jury; (2) the error was not prejudicial and did not "seriously" affect the fairness or integrity or public reputation of judicial proceedings. (App. A at 10-11, citing *Johnson v. United States,* 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). The magistrate judge ignored all the elements except "materiality" of the offenses charged which were taken from the jury by the district judge.

On August 12, 1999, Petitioner filed objections to the "Report and Recommendation." On September 24, 1999, the district court judge entered an order adopting the "Report and Recommendation." (Appendix B) However, the district judge noted that the magistrate judge had ignored Petitioner's claim that the element of 18 U.S.C. § 1001 that the claim was presented to an agency of the United States and the element of 18 U.S.C. § 287 that the claim was presented to an agency of the United States had been unconstitutionally decided by the judge rather than the jury.

The court disposed of the 18 U.S.C. § 1001 claim by holding that it is "indisputable" that the United States Department of Health and Human Services is an agency of the United States and that such "legislative facts" need not be submitted to the jury for determination in a criminal case. The court further held that it rather than the jury could also constitutionally determine that the private insurance company to which the claim was actually submitted by Petitioner because "it is well-established that such companies are in fact agencies" and that "claims submitted to such companies may form the basis of criminal liability under Section 1001." (App. B at 3) The district court further held that harmless error analysis applied to this case because despite the court "withholding" two elements of the § 1001 offense the jury was "still able to consider" whether Petitioner had knowingly, voluntarily and intentionally made a false, fictitious or fraudulent statement. The court ruled that "the errors in the jury instructions did not prevent the criminal trial from serving its function as a vehicle for determination of Petitioner's guilt or innocence." (App. B

at 5) The court further ruled that Petitioner could not demonstrate that his "substantial rights" had been affected. (App. B at 6)

The court disposed of the 18 U.S.C. § 287 claim by repeating its position that the court rather than the jury had the right to decide that "a private insurance company contracting with HHS to administer Medicare and other programs is an agency within the scope of 18 U.S.C. § 287." (App. B at 6)

Petitioner filed on November 15, 1999, a motion for a certificate of appealability with the district court. On November 17, 1999, Petitioner filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit. On November 18, 1999, the district judge issued an order, without opinion, denying the motion for certificate of appealability. (Appendix C) Petitioner filed a motion for a certificate of appealability with the Sixth Circuit. On April 10, 2000, the Sixth Circuit denied the motion for a certificate of appealability. (Appendix D)

Petitioner now seeks a certificate of appealability from this Court pursuant to the decision of this Court in *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 1972, 141 L.Ed.2d 242 (1998).

REASONS THE WRIT SHOULD BE GRANTED

The Failure of the Lower Courts to Grant a Certificate of Appealability Is Contrary to the Decisions of this Court.

The record in this case shows without dispute that in Petitioner's criminal trial in the United States District Court for the Middle District of Tennessee the district judge presiding over the trial took from the jury and decided himself two of the four elements of one of the criminal statutes Petitioner was charged with violating, 18 U.S.C. § 1001, and one element of another criminal statute he was charged with violat-

ing, 18 U.S.C. § 287. In this proceeding, Petitioner is merely seeking a certificate of appealability to the United States Court of Appeals for the Sixth Circuit of the Memorandum Order of the United States District Court for the Middle District Of Tennessee entered on September 29, 1999, denying Petitioner's 28 U.S.C. § 2255 motion which is based on Petitioner's claim that he received ineffective assistance of counsel because his counsel did not object to the court rather than the jury deciding these elements of the criminal offenses charged against him. The standard to be employed by this Court in deciding whether to grant Petitioner relief is whether Petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Petitioner believes he has made such a showing. He contends that the jury verdict convicting Petitioner of 17 counts charging violations of 18 U.S.C. 1001 and 18 U.S.C. 287 was constitutionally invalid because the district court instructed the jury that it had decided against the Petitioner on two of the four elements of the 18 U.S.C. § 1001 charges (Counts 14 - 29) and on one of the elements of the 18 U.S.C. § 287 charge (Count 35) and that the jury was only to concern itself with the remaining elements of the offenses charged in reaching a verdict.

Materiality was one of the elements of the § 1001 charge taken from the jury. Petitioner's counsel made no objection to the court deciding this issue and informing the jury that it had decided the issue against Petitioner.

This Court decided in *United States v. Gaudin,* 515 U.S. 506, 522-523, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) that in criminal trials where the offense charged includes the element of materiality, the Constitution requires that the jury and not the court decide the defendant's guilt of that element beyond a reasonable doubt. The basis of the *Gaudin* decision is that "The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."

This Court has recently reaffirmed that principle in *Apprendi v. New Jersey,* 2000 WL 807189 (U.S.) in which the Court held that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum, must be submitted to the jury and proved beyond a reasonable doubt. The Court stated the constitutional principle at issue as follows:

> "At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," ... and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,"... Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin,* 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); see also *Sullivan v. Louisiana,* 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); ... As we have, unanimously, explained, *Gaudin,* 515 U.S., at 510-511, 115 S.Ct. 2310, the historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...." 4 W. Blackstone, *Commentaries on the Laws of England*

343 (1769) (hereinafter Blackstone) (emphasis added). See also *Duncan v. Louisiana,* 391 U.S. 145, 151-154, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)."

In light of these clear authorities, the decision of the trial judge in the instant case to himself decide the elements of the offenses charged is clear constitutional error. *Gaudin* makes that clear as to the materiality element of § 1001. The element of the status of the private insurance company allegedly contracting with the U. S. Department of Health and Human Services is fraught with factual determinations, including, but not limited to whether there was such a contract, what were its terms, was it in effect at the relevant time, etc. Consequently, both as to the § 1001 and the § 287 charges, the court decided a mixed question of law and fact in violation of the *Gaudin* and *Apprendi* decisions of this Court.

Of course, the question is whether it was ineffective assistance of counsel for Petitioner's counsel to fail to make appropriate objection to these errors. The magistrate judge and the district court ruled that Petitioner's counsel had no duty to object to the court deciding the element of "materiality" because it was clearly the law of the Sixth Circuit at the time of Petitioner's trial that "materiality" was a question of law to be decided by the court and not the jury.

However, prior to *Gaudin,* there was considerable authority that, "A court cannot, no matter how clear the defendant's culpability, direct a guilty verdict. See *Carpenters v. United States,* 330 U.S. 395, 410, 67 S.Ct. 775, 91 L.Ed. 973 (1947); *Rose v. Clark,* 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); *Arizona v. Fulminante,* 499 U.S. 279, 294, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (White, J., dissenting)." See also, *Sullivan v. Louisiana,* supra, *Duncan v. Louisiana,* supra, and *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This Court has consistently held that "[w]here the basis of a ... claim is available, and other defense counsel have perceived and litigated that claim, the demands

of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." *Engle v. Isaac,* 456 U.S. 107, 134, 102 S.Ct. 1558, 1575, 71 L.Ed.2d 783 (1982). See also, *Bousley v. United States,* 523 U.S. 614, 622-623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (criminal defense counsel has an obligation to assert defenses even if the defense would be futile before the particular court at a particular time.) The precedent in the United States Court of Appeals for the Ninth Circuit at the time of Petitioner's trial was that the issue of materiality had to be submitted to the jury rather than being decided by the Court. *Gaudin v. United States,* 28 F.3d 943 (9th Cir. 1994) (*en banc*)

The issue of whether the private insurance company was in such a contractual relationship with the United States Government to constitute it in this particular instance for these particular claims an agency of the United States was such an obviously mixed question of law and fact that there is no rational excuse for Petitioner's defense counsel failing to object to the court taking this issue from the jury and deciding it.

The test for constitutionally ineffective assistance of counsel is set out in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced him. It seems clear that counsel's performance was deficient. In *Neder v. United States,* 527 U.S. 1, 14, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), this Court held that the omission in jury instructions of an element of the offense charged was subject to harmless error analysis. However, in *Neder* the omitted element was materiality. Here the omitted elements are not only materiality, but also the question of the nature of the contractual relationship between the private insurance company involved and the United States Government on which Federal jurisdiction depends. Moreover, as to the § 1001 charges, ***two of the four***

elements were decided by the court. This raises the as yet unresolved issue of how many elements of an offense can the court constitutionally decide rather than the jury before structural error is present.

A verdict ceases to be a jury verdict when it is the verdict of the court and the jury acting in combination, one deciding some elements and the other deciding the remaining elements. The trial by jury guarantee is simply abrogated. It is structural error for the court to decide a criminal defendant's guilt of any elements of the offense because to that extent the verdict is not a verdict rendered by the jury. In the instant case, the court did not give a wrong or misleading jury instruction on one or more elements. The court decided the Petitioner's guilt of various elements of the criminal offenses with which he was charged and informed the jury of those decisions. Surely it would have been structural error for the court to instruct the jury that it had also decided that the statements and claims at issue were false? Would the constitutional requirement of trial by jury have been met by the jury deciding only the element of the knowledge and intent of Petitioner? Certainly not! Three of the four elements would then have been decided by the court. What is the constitutional difference in the court deciding two as opposed to three elements? Or, would it be necessary for the court to decide all the elements in of the offense charged in order for structural error to occur? Under what circumstances, if any, is the decision of the guilt or innocence of the criminal defendant by the court rather than the jury exempt from harmless error review?

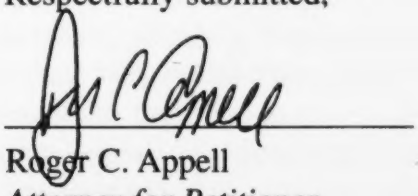
Petitioner has fairly presented these questions. He is entitled to have these questions resolved by an appellate court. Petitioner has made a "substantial showing of the denial of a constitutional right." In *Slack v. McDaniel,* ___U.S.___, 120 S.Ct. 1595, 1603, ___L.Ed.2d___ (2000) this Court held that a "substantial showing" is made as to an issue if jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of

reason would find it debatable whether the district court was correct.

CONCLUSION

Petitioner has made the required showing. A certificate of appealability should issue.

Respectfully submitted,



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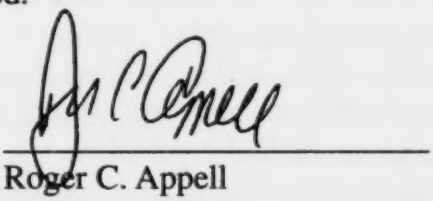
CERTIFICATE OF SERVICE

I certify that I have served two copies of the foregoing Petition for Writ of Certiorari on Assistant United States Attorney Wendy Goggin, Office of the United State Attorney For the Middle District of Tennessee, 110 Ninth Avenue, S., Suite A961, Federal Building, Nashville, Tennessee 37203-3870, this 10th day of July, 2000, by U. S. Mail, postage prepaid and properly addressed.



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